IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.246 OF 2006

1. Indian Drugs Manufacturer's Association, A Society registered under the Socities Registration Act, through principals secretary Having his office at 102-B, Poonam Chambers, 'A' Wing, Dr.A.B. Road, Worli, Mumbai- 400 018.

2. M/s.EMIL Pharmaceuticals Industries Pvt. Ltd., through Mr.Tushkar Korday, Director having his office at 101, Mangalam, Kulup Wadi, Near National Park, Borivili (East), Mumbai - 400 066. ..Petitioners.

V/s.

1. Union of India, Through the Joint Secretary, Ministry of Law Justice and Company Affairs Aayakar Bhavan, M.K. Road, Churchgate, Mumbai - 400 020.

2. Central Board of Excise & Customs A statutory body incorporated under The Central Board of Revenues Act, 1963 having its office at North Block, New Delhi

3. Ministry of Chemicals and Fertilishers. Through Secretary, Department of Chemicals and Petrochemicals, Having his office at Shastri Bhavan, New Delhi - 110 001. ..Respondents.

Mr.Vikram S.Nankani, Advocate with Mr.M.R.Baya with Ms. Aarti Sathe for the petitioners.

Mr.A.J.Rana, senior Advocate with Mr.Y.S.Bhate for respondents.

CORAM : H.L.GOKHALE AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON : 28TH AUGUST, 2006

JUDGMENT PRONOUNCED ON : 28TH SEPTEMBER, 2006

JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard Counsel for the parties. Rule. Rule made returnable forthwith. By consent of parties, the petition is taken up for final hearing.

2. This petition is filed to challenge the validity of circular No.813 dated 25/4/2005 issued by the Central Board of Excise and Customs, Government of India, New Delhi ('Board' for short). By the said circular the Board has clarified that the valuation of physicians free samples should be made under Rule 4 of the Central Excise Valuation (determination of price of excisable goods) Rules, 2000 ('2000 rules' for short) and not under Rule 11 read with Rule 8 of 2000 Rules as stated in its earlier circular No.643 dated 1/7/2000.

3. The main argument of the petitioners is that the physicians samples cleared from the factory are not sold but are supplied freely to the medical practitioners and, therefore, the valuation of

physicians free samples have to be made by applying the method applicable to the goods which are not sold. It is contended that for more than three decades, the revenue has been valuing the physicians samples by applying the method applicable to goods which are used for captive consumption as per the judicial decisions rendered to that effect. Even after the 2000 Rules were framed, the Board had issued a circular No.643 dated 1/7/2002 directing that the valuation of physicians free samples should be made by applying the method applicable to the goods cleared for captive consumption. Therefore, the impugned circular No.813 dated 25/4/2005 which seeks to value the free samples by applying Rule 4 (applicable to goods that are sold) instead of Rule 8 (applicable to goods that are not sold) is contrary to the judicial decisions holding the field for more than three decades and, hence the said circular No.813 dated 25/4/2005 is liable to be struck down as illegal and contrary to law.

4. The petitioner No.1 Association is a society registered under the Societies Registration Act, 1860. Members of the petitioner No.1 association are engaged in the manufacture of drugs which are cleared on payment of excise duty either for sale in the wholesale trade or for distribution as physicians free samples.

5. On issuance of the impugned circular No.813 dated 25/4/2005, the petitioners had made representations to the Board and also to the concerned Ministry stating that the rule 4 of the 2000 rules is applicable to the goods which are sold whereas, in the case of physicians free samples, there is no sale and, therefore, Rule 4 cannot be applied for valuing the physicians free samples. As there was no response to the said representations, the petitioners have filed the present petition to challenge the validity of circular No.813 dated 25/4/2005.

6. Under the Central Excise Act, 1944 (‘the Act for short) as it stood prior to 1/7/2000 the concept of valuation of excisable goods was based on the deemed value. The deemed value as per section 4(1) (a) of the Act as it stood prior to 1/7/2000 was the normal price at which such goods were ordinarily sold for delivery at the time and place of removal to a buyer who was not a related person and price was the sole consideration. Where the normal price of the goods was not ascertainable for the reason that such goods were not sold or for any other reason, then, as per section 4 (1)(b) of the Act, the valuation was to be determined in the manner prescribed.

7. For determining the value of the excisable goods covered under section 4(1) (b) of the Act, the Central Government had framed Central Excise (Valuation) Rules, 1975 (‘1975 rules’ for short). Rule 4, 6 & 7 of 1975 Rules to the extent relevant read thus:-

> Rule-4. The value of excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable to the proper officer.
>
> Rule-6. If the value of the excisable goods under assessment cannot be determined under rule 4 or rule 5, and -
>
> (a) .....
>
> (b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based -
>
> (i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:
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> Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors

and, in particular, the difference, if any, in the material characteristics of the goods to be assessed of the comparable goods.

(ii) if the value cannot be determined under sub - clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

(c) ......

Rule-7. If the value of excisable goods cannot be determined under the rules, the proper officer shall determine the value of such goods according the best of his judgment, and for this purpose he may have regard, among other things, to one or more of the methods provided for in the foregoing rules.

8. The Excise Act has been amended substantially with effect from 1/7/2000 (‘amended Act’ for short). Under the amended Act, section 4 (1)(a) has been substituted whereby the old concept of valuing the excisable goods based on the deemed value has been done away with and a new concept of valuing the excisable goods based on the transaction value has been introduced. Section 4(1) of the amended Act relevant for the purpose herein reads as under:-

"**Section 4.**

Valuation of excisable goods for purposes of charging of duty of excise - (1) Where under this Act, the duty of excise is chargeable on any

excisable goods with reference to their value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Section 4 (3)(d) of the amended Act defines the expression 'transaction value' as follows:-

S.4(3)(d) 'transaction value' means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

9. With the introduction of the concept of valuation of excisable goods based on transaction value, the Central Government has issued 2000 Rules for valuation of goods covered under section 4(1) (b) of the Act. Rules 4, 8 & 11 of the 2000 rules read thus:-

> Rule 4. The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.
>
> Rule 8. Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be [one hundred and ten per cent] of the cost of production or manufacture of such goods.
>
> Rule 11. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and the general provisions of these rules and sub-section (1) of section 4 of the Act.

10. Since 2000 Rules do not contain a specific Rule for valuing the physicians free samples, the Board by its circular No.643 dated 1/7/2002 directed that the valuation of the physicians free samples be done under the rule 11 with the spirit of rule 8 of the 2000 rules. The relevant portion of the circular No. 643 dated 1/7/2002 is reproduced herein below:-

13.	How will valuation of samples be done which are distributed free, as part of marketing strategy, or as	Since the goods are not sold Section 4 (1) (a) will not apply and recourse will have to be taken to the Valuation covers such a contig-ency. Except Rule 8 all the other rules cover contingencies where sale is involved

in some form or the other. Therefore, the residuary Rule 11 will have to be adopted along with the spirit of the Rule 8. In other words, the assessable value would be 115% of the 'cost of production or manufacture' of the goods.

11. By the impugned circular No.813 dated 25/4/2005 the Board has amended its earlier circular No.643 dated 1/7/2002 and clarified that the valuation of the physicians free samples should be determined under Rule 4 instead of Rule 8 of the 2000 Rules. The relevant portion of the circular No. 813 read thus:

Sl. No.	Old Sl.No.	Point of Doubt	Clarification
1.	13	How will valuation of samples be done which are distri-buted free, as part of marketing strategy, or as gifts or donations?	In case of free samples, the value, should be determined under Rule 4 of Central of Central Excise Valuation (Determination of price of Excis -able Goods Rules, 2000.

12. Validity of this circular No.813 dated 25/4/2005 is challenged in the present petition.

13. Mr.Nankani, learned counsel appearing on behalf of the petitioner submitted that-

a) Section 4(1) (a) of the amended Act applies to the goods sold at the time and place of removal of goods, whereas, Section 4(1)(b) of the amended Act applies to the goods which are sold at a time and place other than the time and place of removal as also to the goods which are not sold. As the physicians samples are not sold but distributed freely to the medical practitioners, the valuation of physicians free samples have to be made under section 4(1)(b) of the Act.

b) Since 1975 the physicians free samples are valued under section 4 (1)(b) of the Act read with Rule 6(b) of 1975 rules which is applicable to the goods used or captively consumed in the manufacture of other articles. As Rule 8 of 2000 Rules is similar to Rule 6(b) of 1975 Rules, the physicians free samples are liable to be valued by applying Rule 8 of 2000 Rules.

c) The fact that Rule 6 (b) of 1975 Rules provided

for two methods of valuation of excisable goods covered under section 4 (1)(b) of the Act namely, valuation based on the value of comparable goods and the valuation based on the cost of production, whereas, Rule 8 of 2000 Rules provides for only one method of valuation based on cost of production, makes no difference, because of the change in the concept of valuation of excisable goods from deemed value to the transaction value. The submission is that in view of the concept of valuation based on 'deemed value' contained in section 4 of the old Act, it was provided in Rule 6 (b) of 1975 Rules that the captively consumed goods could be valued by applying the method applicable to the comparable goods produced or manufactured by the assessee. Once the concept of valuing the goods based on the deemed value was given up and the concept of transaction value was introduced from 1/7/2000, the question of applying the method applicable to comparable goods did not arise and therefore, the Central Government in Rule 8 of 2000 Rules provided that the valuation of captively consumed goods be made by the only method based on the cost of production. Therefore, there is no reason to

deviate from the prevailing practice of valuing the physicians free samples under the rule applicable to captively consumed goods.

d) Relying upon the decisions in the case of **Sun Pharmaceutical Industries V/s. Commissioner of Central Excise** reported in **2005 (183) E.L.T. 42 (Tri.)**, **Commissioner of Central Excise V/s. Trinity Pharmaceuticals Pvt.Ltd.** reported in **2005 (188) E.L.T.48 (Tri.)** and **Medley Pharmaceuticals Ltd. V/s. Commissioner of Central Excise** reported in **2005(183) E.L.T. 471 (Tri.)**, it is submitted that the consistent judicial view taken in the matter during the period from 1975 to 1/7/2000 is that the physicians free samples are liable to be valued by applying the method applicable to captively consumed goods. Even after the introduction of the concept of valuation based on the transaction value, the physicians free samples have been valued by applying the method applicable to captively consumed goods as per circular No.643 dated 1/7/2002. Therefore, the circular No.813 dated 25/4/2005 issued by the Board, directing that the physicians free samples be valued under Rule 4 of 2000 Rules is

totally erroneous, contrary to the judicial decisions prevailing for more than three decades and hence liable to be quashed and set aside.

e) Rule 4 of 2000 Rules applies to the goods which are sold, whereas physicians samples are not sold but distributed freely to the medical practitioners. Rule 4 provides that where the goods are sold but not delivered to the buyer at the time and place of removal, then the valuation of such goods have to be determined with reference to the valuation of similar goods sold and delivered at the time and place of removal nearest to the time and place of removal of the goods under assessment. Since the Physicians free samples are neither sold and delivered at the factory gate nor sold and delivered at any other time, Rule 4 of 2000 Rules cannot be applied and Rule 8 being the only rule applicable to the goods which are not sold, the proper rule to value the physicians free samples is Rule 8 of 2000 Rules.

f) Relying upon the decisions in the case of **Sunflag Iron & Steel Co. Ltd. V/s. Additional Collector of Central Excise** reported in **2003**

(162) E.L.T. 105 (Bom.), **Raymon Glues & Chemicals V/s. Union of India** reported in **2000 (117) E.L.T.29 (Guj.)** and **Indichem V/s. Union of India** reported in **1996 (88) E.L.T. 35 (Guj.)**, it is submitted that the circular No.813 dated 25/4/2005 which is in conflict with the various orders of the Tribunal and which is in conflict with the circular No.643 dated 1/7/2002 is liable to be quashed and set aside.

g) Physicians samples are goods distinct from the goods which are sold in commercial pack. As per Rule 96(ix) of the Drugs & Cosmetics Rules, 1995, every drug intended for distribution to the medical practitioners as a free sample is required to contain a label on the container with the words "physician’s sample Not to be Sold". Under the Drugs (Price Control) Order, 1995 issued under the Essential Commodities Act, 1955 the cost of physicians sample is added to the price fixed for the drugs which are to be sold. As per the Accounting Standards (AS-2) issued by the Institute of Chartered Accountants of India, the value of the physicians free samples is to be determined based on the cost of production for purposes of valuing the inventory

and when such samples are distributed free, the Accounting Standards prescribe that they be treated as part of expenses towards sale of goods. Therefore, on introduction of the concept of valuation based on the transaction value, it is not open to the revenue to apply Rule 4 which is applicable to the goods that are sold for valuing the physicians samples which are admittedly not sold. In this connection reliance is placed on the decisions of the Apex Court in the case **Collector V/s. Dai Ichi Karkaria Ltd.** reported in **(1999) 112 E.L.T. 353 (S.C.)** and the decision in the case of **Commissioner V/s. Cadbury India Ltd.** reported in **2006(200) R.L.T. 353**.

h) relying upon the decision of the Delhi High Court in the case of **Commissioner of Sales Tax V/s. Prem Nath Motor (43 S.T.C. 52**) and the decision of Kerala High Court in **Geo Motors V/s. State of Kerala (122 S.T.C. 285)**, it is submitted that since the value of physicians free samples are already included while calculating the value of the goods meant for sale in the wholesale trade, it is not open to the revenue to value physicians free samples by

applying the value of the goods sold and delivered at the factory gate or any time thereafter.

i) relying upon the decision of the Apex Court in the case of **State of Rajasthan V/s. Rajasthan Chemist Association** reported in **147 S.T.C. 542**, it is submitted that just as the levy of a tax would depend on the occurrence of the taxing event, the measure would depend also on the immediate event inviting the levy and cannot be premised on a non proximate basis.

j) lastly, it is submitted that with the concept of valuation based on the transaction value of each clearances, where the goods are cleared partly on sale and partly for captive consumption, the valuation of the goods cleared on sale would be based on the transaction value under the amended section 4 (1)(a) of the Act and the valuation of the goods cleared for captive consumption would be governed by Rule 8 of 2000 Rules framed under section 4 (1)(b) of the Act. As the physicians free samples are not sold and Rule 8 is the only rule which deals with the goods that are not sold, the physicians free samples are liable to

be valued under Rule 11 read with Rule 8 of 2000 Rules. Accordingly, it is submitted that the circular No.813 dated 25/4/2005 which is illegal and contrary to law be quashed and set aside.

14. Mr.Rana, learned senior advocate appearing on behalf of the respondents submitted that the physicians free samples are physically, chemically and functionally same as those goods which are sold in the wholesale market and, therefore, the contention of the petitioners that the physicians free samples are different from the goods sold in the wholesale trade is without any merit.

15. Relying upon the decision of the Apex Court in the case of **Ranbaxy Laboratories Ltd.** reported in **(2003) 9 S.C.C. 109**, Mr.Rana submitted that the physicians free samples are excisable goods and being the final product, the physicians free samples cannot be considered on par with the goods which are captively consumed in the production or manufacture of final product.

16. Mr.Rana further submitted that Rule 4 of 2000 Rules is the proper rule applicable for valuation of physicians free samples because usage of the term

'physicians sample' itself implies that these samples are representative of the whole i.e. 'such goods' sold commercially. The purpose of physicians samples is to promote the goods which are introduced in the market or being introduced in the market. Therefore, the physicians samples and the goods sold in the market are same, they are liable to be valued under Rule 4 of 2000 Rules. Rule 8 applies to goods captively consumed in the manufacture of final products. Since the physicians samples are final products, Rule 8 cannot be applied to physicians free samples. The circular No.643 dated 1/7/2002 issued by the Board to the effect that the physicians free samples be valued by applying the spirit of Rule 8, was erroneous and, therefore, the mistake has been rectified by the Board by issuing the impugned circular No.813 dated 25/4/2005 clarifying that the physicians free samples be valued as per Rule 4 instead of Rule 8 of the 2000 Rules. Accordingly, Mr.Rana submitted that the petition is devoid of any merit and the same is liable to be dismissed.

17. We have carefully considered the rival submissions as also various decisions cited before us.

18. The basic dispute in the present case relates to the method of valuation to be followed in respect of

physician samples cleared for free distribution.

19. Upto 30/6/2000, section 4 (1)(a) of the Act provided that the valuation of the excisable goods be made on the basis of the deemed value i.e. the normal value at which such goods were ordinarily sold for delivery at the time and place of removal.

20. With effect from 1/7/2000, section 4 (1)(a) of the Act has been substituted by a new section, according to which the valuation of excisable goods has to be made on the basis of transaction value. Section 4 (1) (a) of the amended Act provides that where the excise duty is chargeable on any excisable goods with reference to the value, then, in respect of the goods sold and delivered by the assessee at the time and place of removal, the transaction value at each removal shall be the value for computing the excise duty, subject to the condition that the price is the sole consideration and the buyer is not related to the assessee. In all other cases, the valuation of excisable goods is to be determined under section 4 (1)(b) of the Act read with 2000 Rules. In other words, what section 4 (1)(a) of the Act provides is that where the goods are sold and delivered at the time and place of removal, the basis of valuation would be

the transaction value at each removal and in respect of all other clearances, the valuation shall be determined under section 4 (1)(b) of the Act read with 2000 Rules.

21. Physicians free samples are admittedly not sold and delivered at the time and place of removal or at any time thereafter and, therefore, the valuation of physicians free samples have to be determined under section 4 (1)(b) of the Act read with 2000 Rules.

22. Rule 4 of 2000 Rules is a general rule and it provides that the value of excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment. Rules 5,6,7,9 & 10 of 2000 provide for the method of valuation in respect of goods sold and delivered at a place other than the place of removal or where the price is not the sole consideration for sale or where the excisable goods are sold after their clearance from the place of removal or where the goods are sold through a related person or sold through an inter connected undertaking. Rule 8 provides for the method of valuation in respect of goods that are not sold but are cleared for use and consumption in the production or manufacture of other articles. Rule 11 provides that if the value of any

excisable goods cannot be determined under the above rules, then the value shall be determined by using reasonable means consistent with the principles and general provisions of 2000 Rules and section 4 (1) of the Act.

23. In the present case, it is admitted by counsel on both sides that Rule 5,6,7,9 & 10 of 2000 Rules are not applicable to the physicians free samples because rule 5,6,7,9 & 10 apply to cases where the goods are sold whereas physicians samples are not sold. Therefore, the question is, which of the remaining Rule 4, 8 & 11 of the 2000 Rules would be applicable for the valuation of physicians free samples.

24. In our opinion, the physicians samples cannot be valued under Rule 8, because physicians samples are not cleared for use and consumption in the production or manufacture of other articles. Rule 8 applies to cases, where the goods are not sold but are cleared exclusively for use and consumption in the production or manufacture of other articles. Admittedly, the physicians samples are cleared for free distribution to the medical practitioners and are not cleared for use and consumption in the production or manufacture of other articles and, therefore, the method of valuation

provided under Rule 8 cannot be applied for the valuation of physicians free samples.

25. Thus, the remaining rules, namely rule 4 and rule 11 are the only two rules that can be applied for the valuation of physicians free samples. As noted earlier, Rule 4 is a general rule and provides that the valuation of excisable goods that are not sold and delivered at the time and place of removal shall be based on the value of such goods sold and delivered at any other time nearest to the time of the removal of goods under assessment. The word ‘such goods’ in Rule 4 clearly means that the goods in question must be similar or identical to and have same quality or character to the goods sold and delivered. In other words, what Rule 4 provides is that in all cases where the goods are not sold and delivered at the time and place of removal, its valuation is to be made by taking the value of such goods sold and delivered at the time nearest to the time and place of removal of the goods in question.

26. The above method of valuation contained in Rule 4 can be best understood by the following illustration. Suppose on 1/4/2006 the goods manufactured by the

assessee are sold and delivered to different parties from the factory gate / warehouse at 10.00 a.m., 12.00 noon and 4.00 p.m. respectively. If on the same day, similar goods are cleared otherwise than by sale at 1.00 p.m., then as per Rule 4, the value of goods cleared at 1.00 p.m. shall be determined by taking the value of the goods sold and delivered at 12.00 noon being the nearest to the time of the removal of the goods in question.

27. In our opinion, Rule 4 squarely applies to the clearances of physicians free samples, because, physicians samples are not clearances by way of sale and delivery at the time and place of removal and such goods meaning thereby goods similar or identical to physicians samples are also sold and delivered at the time and place of removal. By the very nature, the physicians samples have to be strictly identical to the goods which are cleared on sale in the wholesale trade. In fact, by distributing physicians samples freely, the assessee represents to the physicians that the product

same physical and chemical properties, composition, potency, etc. Thus, the physicians samples cleared for free distribution are liable to be valued under Rule 4

on the basis of the value of such goods sold and delivered at any other time nearest to the time and place or removal of the physicians samples.

28. The argument that Rule 4 applies only to goods sold but not delivered to the buyer at the time and place of removal cannot be accepted because, Rule 4 is a general rule and does not contain any words which warrant such restricted meaning. The fact that Rule 4 permits adjustments in the value on account of the difference in the dates of delivery of such goods, if any, it cannot be inferred that Rule 4 is restricted to goods sold but not delivered at the time and place of removal. By use of the words "if necessary" in Rule 4, it is made clear that the adjustments shall be permitted wherever necessary. In other words, Rule 4 would also cover cases where such adjustment is not necessary. To put it simply, there is nothing in Rule 4 to suggest that it applies only to goods sold but not delivered at the time and place of removal.

29. It was contended that the revenue, based on several judicial decisions of the Tribunal, has been valuing the physicians free samples for nearly three decades by applying the method applicable to captively consumed goods and, therefore, even under 2000 Rules

the physicians samples are liable to be valued by applying the rule applicable to captively consumed goods. There is no merit in this contention, because, firstly, 1975 Rules and 2000 Rules are not identical. Under Rule 6 (b) of 1975 Rules, two methods were provided for valuation of captively consumed goods, namely valuation based on the value of comparable goods [Rule 6(b) (i)] and valuation based on the cost of production [Rule 6 (b) (ii)] whereas Rule 8 of 2000 Rules provides for only one method of valuation based on the cost of production. Secondly, even under the 1975 Rules, the decisions of the Tribunal were to the effect that the physicians samples are liable be to valued by applying the value applicable to comparable goods and not the method based on the cost of production. Thirdly, as held by the Tribunal in the case of Medley Pharmaceuticals Ltd. (supra), Rule 4 and Rule 6(b) (i) of 1975 Rules being similar, the result would be same if Rule 4 is substituted by Rule 6 (b) (i). In other words, the fact that rule similar to Rule 6 (b)(i) of 1975 Rules is not to be seen in 2000 Rules would not preclude the revenue from valuing the physicians samples under Rule 4 especially when rule 4 of the 2000 Rules is similar to Rule 4 of 1975 Rules. Therefore, valuation of physicians samples under Rule 4 of 2000 Rules would be reasonable and in consonance

with the principles consistently followed in the last three decades.

30. Various decisions relied upon by the counsel for the petitioners do not support the case of the petitioners because in none of those cases the scope of Rule 4 of 2000 Rules has been considered. Decisions rendered under the 1975 Rules as stated above, in fact, do not support the case of the petitioners. The contention that Rule 8 is the only rule which deals with the instances where the goods are not sold and, therefore, Rule 11 with the spirit of Rule 8 have to be applied to the physicians samples cannot be accepted because Rule 8 applies to cases where the goods are not sold but are consumed captively in the manufacture of other articles. In the cases of physicians samples, the clearances are not for captive consumption and moreover, goods similar or identical to physicians samples are sold in the market. Therefore, the question of applying the spirit of Rule 8 does not arise at all.

31. The fact that the Board had issued a Circular No.643 dated 1/7/2002 directing that the physicians

samples be valued under Rule 8 does not mean that the

revenue cannot withdraw that circular even if it is found to be was erroneous and issue a circular which is in consonance with the Act and the Rules made thereunder.

32. The argument of the petitioners that the physicians samples are distinct from the goods sold in the market is without any merit. As noted earlier, the physicians free samples must be similar or identical to the goods that are sold in the wholesale trade. If the physicians samples are not similar or identical to the goods that are sold in the wholesale trade, then the consequences will be disastrous, because, the physicians prescribe medicines based on the free samples supplied by the assessee. The fact that the physicians samples may be distributed in a different pack or in a different bottle would not make the physicians samples different from the goods sold in the open market. The difference in the size or quantity may entitle the assessee to some adjustment in the value, however, that would not make the physicians samples to be distinct from the goods sold in the open market. In other words, irrespective of the fact that the physicians samples are distributed in a pack different from the pack that is sold in the market, the valuation of the physicians free samples have to be

determined under Rule 4 by applying the valuation of such goods sold in the open market.

33. Assuming that the petitioners are right in contending that the valuation of the physicians samples cannot be determined under any of the specific rules, even then, as per Rule 11 the value of physicians samples has to be determined by using reasonable means consistent with the principles and the general provisions of 2000 Rules and section 4(1) of the Act. As stated earlier, Rule 4 is the only general rule and, therefore, it is just and proper to hold that the valuation of physicians samples be determined under Rule 11 read with Rule 4 and such a valuation would be reasonable and consistent with the principles and the general provisions of the Rules and the Act. The contention that the physicians samples must be valued under Rule 11 read with Rule 8 cannot be accepted because, Rule 8 applies to cases where the goods are not sold but are captively consumed whereas, goods similar to physicians samples are in fact sold in the open market and in fact physicians samples are not cleared for captive consumption. Hence the valuation of physicians samples cannot be determined under Rule 11 read with Rule 8 of the 2000 Rules.

34. In the result, we see no merit in the petition. Accordingly, the petition is dismissed. Rule stands discharged, however, with no order as to costs.

(H.L.GOKHALE, J.)

(J.P.DEVADHAR, J.)